Supreme Court, U.S.
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No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER SYLVESTER MOSLEY

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ARGUMENT

Respondent's brief makes this an easy case. Respondent admits, as it must, that larceny was a lesser included offense of robbery at common law, with both offenses requiring proof of the specific intent to steal. (Resp. Br. 22-23). Respondent also admits that, prior to the recodification of federal criminal statutes in 1948, the federal bank robbery prohibition included this same common law element of the specific intent to steal. (Resp. Br. 25) ("The common law mental element of larceny – 'feloniously takes' – was incorporated into bank robbery in 1934 but eliminated in 1948.") Finally, respondent admits that, under this Court's decision in *Morissette v. United States*, 342 U.S. 246 (1952), "bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." (Resp. Br. at 32). The parties are on common ground on all three points. (*See* Pet. Br. 12-16, 17, 11-12). The dispute here thus reduces to a simple question – namely, in 1948, when Congress recodified the offense of bank robbery, did it eliminate the specific "intent to steal" element that had been part of the offense for the fourteen previous years? The answer, equally simple, is "No."

The text and history of 18 U.S.C. § 2113, viewed against the backdrop of undisputed common law principles, define bank larceny as a lesser included offense of bank robbery. Respondent offers nothing of substance to the contrary. First, as respondent admits, *Morissette* provides the proper method for analyzing the effect of the 1948 recodification on the bank robbery prohibition. The recodified federal bank statute, just like the recodified

theft statute at issue in *Morissette*, incorporates the intent to steal element from the common law, and respondent's efforts to diminish the force of *Morissette* are unpersuasive. Second, *Prince v. United States*, 352 U.S. 322 (1957), which explained the relationship between the robbery and unlawful entry offenses in § 2113, provides further support for the conclusion that bank robbery, like bank larceny, requires proof of the specific intent to steal. Third, *Bell v. United States*, 462 U.S. 356 (1983), does not, as respondent contends, cut the bank robbery and bank larceny prohibitions of § 2113 free from their common law moorings. Finally, respondent's remaining arguments either conflict with its own admission that *some* intent requirement must be implied for bank robbery (Resp. Br. at 16-17), or are makeweights. Respondent's tortured arguments only serve to distort beyond recognition this Court's jurisprudence.

1. This Court's decision in *Morissette* provides the proper method for analyzing the effects of the 1948 recodification of the federal criminal code on the bank robbery and bank larceny statutes at issue in this case.

In *Morissette*, the Court construed 18 U.S.C. § 641, a general prohibition on the theft of United States government property.[1] *Morissette* was indicted and convicted on

[1] Section 641 provides, as it did when *Morissette* was decided, as follows: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [s]hall be fined . . . or imprisoned. . . . " *Compare* 18 U.S.C. § 641 with *Morissette*, 342 U.S. at 248, n.2 (quoting § 641).

the charge that he "did unlawfully, wilfully and knowingly steal and convert" spent bomb casings belonging to the United States Government. 342 U.S. at 248. The core of his defense, rejected by both the trial court and the court of appeals, was that "he believed the casings were cast-off and abandoned, that he did not intend to steal the property," *id.*, and that § 641 required proof of an intent to steal, *id.* at 249-50. This Court, after careful review of the several statutes that were drawn together and recodified as § 641, concluded that, despite the trimming of specific intent terminology from the recodified statute, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Rejecting the government's contention that the offense of conversion under § 641 required proof only of general intent,[2] the Court turned to the common law as the touchstone for interpreting the statute:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the

[2] "That the removal of [the spent casings] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances." *Morissette*, 342 U.S. at 276 (emphasis in original).

> defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative. . . . [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*

Id. at 263 (emphasis added). The Court thus drew on the common law to imply a specific rather than general intent element – the intent to steal – for a statute that, after recodification in 1948 (unlike before), was silent on the question of intent. Importantly, although Congress had dropped express requirements of felonious intent from the offenses recodified at § 641 (with Reviser's Notes stating that "[c]hanges were made in phraseology"), this Court nevertheless held that Congress had *not* given such "contrary direction" as would justify a break with the common law. *See id.* at 266 n.28. As petitioner has explained (Pet. Br. 8-26), the bank robbery prohibition in § 2113(a) underwent the very same change as § 641 in 1948, and the same result should obtain here as in *Morissette*.

In the face of *Morissette*, respondent grudgingly admits that "bank robbery must be presumed to contain a

mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." (Resp. Br. 32). But, according to respondent, the specific intent element shared by common law robbery and common law larceny alike – the intent to steal – is *not* the mental element to imply for bank robbery. (Resp. Br. 32-33). Respondent seeks to justify this sharp departure from *Morissette* with the following purported "plain text" argument: by leaving the "intent to steal or purloin" element in the definition of bank larceny at the same time it deleted "feloniously" from the definition of bank robbery, Congress must have intended to convert bank robbery from a specific intent to a general intent crime. (Resp. Br. 33). This argument is seriously flawed. First, having already admitted that an element of the crime must be implied, respondent has placed the relevant interpretive questions beyond the grasp of "plain text" alone.[3] Second, respondent ignores the extent to which, even after recodification, the bank robbery and bank larceny provisions continue to adhere to the language of the common law. (*See* Pet. Br. 20-26). In short, respondent offers no principled basis for deciding the case at bar any differently from *Morissette*.

2. This Court's decision in *Prince* provides additional direct support for petitioner. (Pet. Br. 23-24). Respondent attacks petitioner's reliance on *Prince*, asserting that "the 'narrow' issue before the Court in [*Prince*] was whether the statute" at issue here, 18 U.S.C. § 2113, "authorized cumulative punishment for the two offenses [of bank robbery and unlawful entry], and that was the

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[3] *See also infra* at pp. 7-10, Point 4.

only issue the Court resolved." (Resp. Br. 30). This attack sidesteps the issue. Respondent recites the result in *Prince* correctly, but ignores its reasoning.

After analyzing the legislative history of § 2113, this Court concluded in *Prince* that an unlawful entry offense merges with a completed bank robbery, thus barring cumulative punishment for bank robbery and unlawful entry convictions. 352 U.S. at 325-29. Central to the Court's conclusion was the premise that both unlawful entry and bank robbery share the *same* specific intent to steal:

> The gravamen of the [unlawful entry] offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (emphasis added) (footnote omitted). As petitioner has explained, the Court's reasoning in *Prince* makes sense only if bank robbery, like unlawful entry of a bank, has at its heart the specific intent to steal. (Pet. Br. 24). Respondent does not, and cannot, refute this basic point.

3. The decision in *Bell* does not, as respondent contends, cut § 2113 off from its common law roots. (Resp. Br. 26). As petitioner has explained (Pet. Br. 24 n.11), this Court held in *Bell* that the government can satisfy the "takes and carries away" element of bank larceny with proof that a defendant took the bank's property by false pretenses, 462 U.S. at 360, a manner of taking property that fell outside the scope of the "takes" element of

common law larceny, *id.* at 359. It is equally clear, however, that this Court left the "takes and carries away" element itself intact; as the Court was careful to state, § 2113(b) "does *not* apply to a case of false pretenses in which there is not a taking and carrying away."[4] *Id.* at 361 (emphasis added). In this case, in sharp contrast to *Bell*, respondent seeks *not* to broaden the manner of proving the specific intent element of bank robbery, but rather seeks to eliminate the specific intent element from bank robbery altogether. Neither *Bell* nor any other decision of this Court supports such a result, and *Morissette* requires the conclusion urged by petitioner.

4. Respondent contends that the plain text of the bank robbery and bank larceny provisions of 18 U.S.C. § 2113 easily disposes of the "lesser included offense" issue here. (Resp. Br. 12-16). The core of respondent's argument is that, "[w]hile bank larceny contains an express 'intent to steal or purloin' element, bank robbery has no such mental element in its text." (Resp. Br. at 12). However, respondent deprives its "plain text" argument of what little force it may have in the very next breath by asserting that it is perfectly appropriate to *imply* a *general*

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[4] As petitioner has explained (Pet. Br. 24 n.11), and as this Court's recent decision in *Evans v. United States*, 504 U.S. 255 (1992), demonstrates, there is nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense continues to hew to the common law definition of that offense. *Id.* at 263-64 ("Although the present statutory text is much broader than the common-law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (construing Hobbs Act, 18 U.S.C. § 1951).

intent element into the bank robbery statute.[5] (Resp. Br. 16). According to respondent,

> [a]lthough bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." There is a presumption that any federal criminal offense requires a mental element. Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one.

(Resp. Br. 16) (citations omitted) (quoting and citing, *inter alia, Staples v. United States*, 511 U.S. 600 (1994)).[6] But respondent cannot have it both ways. If, as respondent admits, this Court's federal criminal jurisprudence makes it proper to imply an intent element of some kind into the bank robbery statute, then the plain text alone of the bank robbery and bank larceny provisions *cannot*, as respondent argues elsewhere, provide the answer to the "lesser included offense" question in this case.

In any event, the authorities cited by petitioner and respondent alike make it clear that the bank robbery statute cannot be taken to define a strict liability offense, and that *some* intent element must therefore be implied in the statute. One question remains: *which* intent element should be implied, general intent or the specific intent to

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[5] Respondent thus tacitly concedes the absurdity in holding, as the Third Circuit appears to have done, that bank robbery is a strict liability offense. (*See* Pet. Br. 10-11 and n.5).

[6] Petitioner has, of course, made the very same points. (Pet Br. 8-11) (discussing *Staples*).

steal? By relying on the text, the common law and the statutory history of § 2113, as well as cases such as *Morissette* and *Prince*, petitioner has identified – on a principled basis – the specific intent to steal as the *mens rea* that Congress chose for the offense of bank robbery.

Respondent, by contrast, contends that general intent is the proper choice. For support, respondent cites "diminished capacity" cases from the courts of appeals. (Resp. Br. 16-17 and n.8). Not one of the cases on which respondent relies, however, determined the requisite intent for bank robbery by analyzing the common law antecedents and statutory history of § 2113, as *Morissette* requires. Instead, these cases relied on the superficial contrast between the plain text (which respondent concedes is inadequate in this instance) definitions of bank robbery, unlawful entry and bank larceny and thus provide little, if any, support for respondent. *See, e.g., United States v. Johnston*, 543 F.2d 55, 58 (8th Cir. 1976) ("A simple comparison of the language in the two paragraphs of § 2113(a) convinces us that Congress chose to define the second paragraph in terms of specific intent and consciously did not include language of specific intent in the first paragraph."); *United States v. DeLeo*, 422 F.2d 487, 490-91 (1st Cir. 1970) (same). Respondent also offers a jumble of policies generally related to robbery as a basis for implying a general intent element in the bank robbery statute. (Pet. Br. 17-19). These policy arguments, which are in no way anchored in the statutory text or the common law, should be rejected.

The other statutory construction cases that respondent cites do not support its position. For example, in *Bates v. United States*, this Court held that the "specific

intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of [student loan] funds proscribed by" 20 U.S.C. § 1097(a). 118 S. Ct. 285, 288 (1997). In so holding, this Court contrasted 20 U.S.C. § 1097(a) against both § 1097(d)'s express "intent to defraud" element and 18 U.S.C. § 656's prohibition on the willful misapplication of bank funds, stating that §"1097(a) *never* contained, as § 656 did, an 'intent to defraud' requirement, a requirement present from the start and still contained in § 1097(d)." *Id.* at 290. As respondent admits (Resp. Br. 25), the bank robbery statute, unlike the statute at issue in *Bates*, *did* contain a specific intent element, at least until 1948. *Bates* is simply inapposite.

In *United States v. Shabani*, this Court held that the drug conspiracy provision at 21 U.S.C. § 846 does not require the government to prove an overt act in furtherance of the conspiracy, 513 U.S. 10, 11 (1994). In so holding, the Court followed the common law definition of conspiracy rather than implying an overt act requirement into § 846, the text of which is silent on the point. *Id.* at 13-14 ("[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms. We have consistently held that the common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability") (internal quotations omitted) (citations omitted). Similarly, in *United States v. Wells*, the Court declined to imply a materiality element into the false statement prohibition of 18 U.S.C. § 1014 because, among other things, the defendants did not "come close to showing that at common law the term 'false statement'

acquired any implication of materiality that came with it into § 1014." 117 S. Ct. 921, 927 (1997). In the case at bar, by contrast, the common law definitions of the offenses at issue – robbery and larceny – support the conclusion that a specific intent element should be implied in the definition of bank robbery provided in 18 U.S.C. § 2113(a). *Shabani* and *Wells*, like *Bates*, are inapposite.

Finally, respondent also cites a host of other federal anti-robbery statutes, some of which purportedly require proof of specific intent (Resp. Br. 15 n.7), and some of which purportedly do not (Resp. Br. 14-15). At best, these statutes show that Congress has used a variety of verbal formulas to incorporate one or more of the common law elements of robbery into a variety of criminal statutes. Respondent's argument does not answer the question here, which is whether, despite seeming congressional silence, § 2113(a) like § 2113(b), requires proof of the specific intent to steal.

5. Respondent, making another "plain text" argument, points to a purported difference between the bank robbery provision's "takes" element, 18 U.S.C. § 2113(a), and the bank larceny provision's "takes and carries away" element, 18 U.S.C. § 2113(b). (Resp. Br. 19-20). According to respondent, this textual difference shows that bank larceny has a "carries away" element that bank robbery lacks. However, this textual difference between the bank robbery and bank larceny provisions hews to the language of the common law and thus supports petitioner, not respondent.

First, as respondent admits, the "carries away" portion of the bank larceny statute is rooted in the common

law's "asportation" requirement. (Resp. Br. 20, 22). Congress thus used common law language – and, by inference, common law meaning – to define bank larceny. *See Evans v. United States*, 504 U.S. 255, 259 (1992); *Morissette*, 342 U.S. at 263. Second, as respondent itself notes, common law robbery, which plainly shared common law larceny's asportation requirement, "was often defined in simple and undetailed language" that makes *no* mention of asportation, "such as the 'felonious and violent taking of goods or money from the person of another by force or intimidation.' " (Resp. Br. 22) (quoting 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986)). Indeed, as LaFave and Scott observe, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common law robbery." 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6. Section 2113(a) simply conforms to this feature of American robbery statutes. (See also Pet. Br. 12-13 and n.8) (providing common law formulations of robbery and larceny). Congress thus followed common law usage just as closely by leaving "carries away" implicit for bank robbery as it did by making "carries away" explicit for bank larceny. Common law meaning thereby follows.

6. Respondent's contention that bank larceny, unlike bank robbery, requires proof of a specific monetary value for the stolen property (see Resp. Br. 21) is a makeweight and should be rejected. The bank larceny statute prescribes two degrees of punishment in two separate paragraphs, the severity of the punishment depending upon the value of the property taken from the bank.

Where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), first paragraph *with* 18 U.S.C. § 2113(b), second paragraph. Respondent, for its part, expressly notes this very feature of section 2113(b). (Resp. Br. 10 n.2).

In a bank larceny prosecution, the *only* function served by proof of the precise monetary value of the stolen property (as opposed to proof that the property has some value greater than $0) is to distinguish between the two levels of punishment provided in § 2113(b). However, with respect to the basic theft element – that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are *identical*. *Compare* 18 U.S.C. § 2113(a), (b) (first paragraph) *with* (b) (second paragraph). In other words, it could scarcely be more plain that the differing degrees of punishment for bank larceny do not constitute a separate element that distinguishes bank larceny from bank robbery. *See Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1229-30 (1998) (a sentencing factor is not an element of the crime); *United States v. Belt*, 516 F.2d 873, 875 (8th Cir.) ("The element of value in [18 U.S.C.] § 661 establishes the degree of the larceny committed for purposes of prescribing punishment; it is not an essential element of the [offense]."), *cert. denied*, 423 U.S. 1056 (1975). Indeed, the Third Circuit recognized as much in its decision in this case. (J.A. 46 n.2).

The Model Jury Instructions provide additional support for this reading of the statute. The model charge on the elements of bank larceny *does not* include value of the

property taken as an element of the offense. 3 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 53-16, at 53-42 (1998). That instruction reads:

> In order to prove this charge against the defendant, the government must establish, beyond a reasonable doubt, each of the following three elements of the offense:
>
> 1. That on or about [date in question], the [name of bank, savings & loan, or credit union] was a bank (*or* savings & loan, *or* credit union), the deposits of which were insured by the Federal Deposit Insurance Corporation (*or* the Federal Savings & Loan Insurance Corporation *or* the National Credit Union Administration);
>
> 2. That the defendant took and carried away money which had been in the possession or care of the bank; and
>
> 3. That the defendant intentionally took the money knowing that he was not entitled to it.

If a jury finds all three elements of the offense, only then is property value considered for penalty purposes. The judge charges that "[i]f, after careful consideration of all of the evidence, you find that the government has proven each of the three elements that I have just described beyond a reasonable doubt, then you must determine the value of the property that the defendant took." *Id.* ¶ 53-23, at 53-54. Simply stated, value "should be considered by the jury only after they have determined that the defendant is guilty of some type of bank larceny within the meaning of section 2113(b)." *Id.* Comment ¶ 53-23, at 53-55. Therefore, § 2113(b) does not create separate offenses for larcenies involving property of varying

values. It uses, however, property value as a factor that affects the offender's penalty.

7. Petitioner has demonstrated that, applying the traditional rules of statutory construction for federal criminal statutes, bank larceny is plainly a lesser included offense of bank robbery. Respondent, unprompted by petitioner, is at pains to urge that the rule of lenity does not apply in this case. (Resp. Br. 33-34). Petitioner agrees, in the sense that the traditional rules of statutory construction, properly applied to the text and history of 18 U.S.C. § 2113, appear adequate to eliminate any doubt regarding the status of bank larceny as a lesser included offense of bank robbery. *See Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (internal quotations omitted) (citations omitted). If, however, this Court concludes that it can only guess at the intended effect of the 1948 recodification on the specific "intent to steal" element that respondent admits (Resp. Br. 25) was part of the pre-1948 bank robbery statute, then this "ambiguity concerning the ambit of [bank robbery] should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S 808, 812 (1971), *i.e.*, a specific "intent to steal" element for bank robbery.

8. Respondent, recycling an argument already pressed in its opposition to certiorari (*see* Opp. Br. 5-7), urges that this case can be resolved on evidentiary grounds and that the Court need not reach the legal question whether bank larceny is a lesser included offense of bank robbery. (Resp. Br. 34-36). This is incorrect.

The district court's decision to refuse the requested "lesser included offense" instruction on bank larceny, based on its view of the evidence in this case, is not before this Court. The Third Circuit expressly declined to review the district court's analysis of whether the evidence would support a bank larceny instruction.[7] (J.A. 45). Instead, the Third Circuit, acknowledging a split among the circuits, held that as a matter of law bank larceny can *never* be a lesser included offense of bank robbery and affirmed the district court judgment on that basis. (J.A. 46-52). This Court granted review to decide the legal question whether bank larceny is a lesser included offense of bank robbery, and that question is properly presented in this case.

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[7] The evidence *did* support the requested "lesser included offense" instruction on bank larceny. (See Pet. Br. 3-4).

CONCLUSION

For the foregoing reasons, Mr. Mosley respectfully requests that the judgment of the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

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